United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

740

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23502

UNITED STATES OF AMERICA,

Appellee,

-v-

JAMES A. WATSON,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

B R I E F F O R A P P E L L A N T

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Table of Contents

CITATIONS

CASES: Page

STATUTES:

*Cases or authorities chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, Appellee, -v- JAMES A. WATSON, Appellant.	Criminal No. 23502

BRIEF FOR APPELLANT

Issues Presented for Review

Whether appellant was denied his Sixth Amendment right to effective assistance of counsel and his right to a fair trial when the police conducted a lineup of the appellant at which the only counsel present was a substitute counsel whose presence was not made known to appellant.

Whether the circumstances surrounding the confrontations between appellant and certain identifying witnesses were so unnecessarily suggestive and conducive to irreparable mistaken identity as to amount to a denial of due process of law when such identification testimony was introduced at trial.

Whether the District Court erred in permitting the jury to return a verdict which was inconsistant, in part, with the court's instructions to the jury.

The pending case was not previously before this court for review.

REFERENCES AND RULINGS

Denial of Motion to Suppress Identification Testimony by Robinson, J.; June 16, 1969 (Tr. 90).

Instructions to the jury with respect to counts 1 and 2 of the Indictment (Inst. 11-17); jury verdict of guilty on all counts (Tr. 337-338); sentencing on counts 1 and 2 (Sent. 5).

STATEMENT OF THE CASE

Jurisdictional Statement

Appellant, James A. Watson, Jr., was found guilty in the United States District Court for the District of Columbia, on June 16, 1969, of armed robbery, robbery, three counts of assault with a dangerous weapon, possession of an unauthorized weapon, unauthorized use of a vehicle and petty larceny in violation of 22 D.C. Code, Sections 3202, 2901, 502, 3214(a), 2204 and 2202, respectively. On August 22, 1969, he was sentenced to serve ten to thirty years for armed robbery, two to fifteen years for robbery, three to nine years for assault with a deadly weapon, [redacted] year for possession of an unauthorized weapon, one to three years for anauthorized use of a vehicle and one year for petty larceny, all sentences to run concurrently. On August 25, appellant filed his notice of appeal and application to proceed in forma pauperis. This Court has jurisdiction upon appeal to review the judgment of the District Court by virtue of 28 United States Code, Sections 1291 and 1294.

Statement of the Facts

Appellant was indicted on February 26, 1969 for armed robbery, robbery, three counts of assault with a dangerous weapon, possession of an unauthorized weapon, unauthorized use of a vehicle, petty larceny, and receiving stolen property. Prior to the commencement of trial, count 10 of the indictment for receiving stolen property was dismissed upon oral motion of the Government. Upon arraignment

on March 14, 1969, appellant pleaded not guilty. On June 16, 1969, appellant's motion to dismiss the indictment on the grounds of insufficient probable cause for arrest and appellant's motion to suppress identification testimony were heard, argued and denied.

The general facts of this case are essentially as follows: On the morning of September 25, 1968, two men robbed the credit union of the Cement Mason's Local 891 at 1024 New Jersey Ave., N.W., of approximately $1,000. These men were observed in the course of the robbery by various employees of the union, Messrs. Wilson, Quarterman, Taylor, McCalip and a Miss Adams. Of these, Messrs. Wilson, Quarterman and Miss Adams were eyewitnesses to the actual robbery. Appellant and Fred Brunson, whose case was tried separately, were arrested shortly thereafter in a northwest carryout shop upon the strength of identification provided by Mr. Taylor. Quarterman identified Brunson but not appellant in the police wagon subsequent to the arrest. Upon a return to the union building in the police wagon, both Brunson and appellant were identified by Wilson and McCalip. At a lineup conducted that evening each of the above persons, except Miss Adams, identified the appellant as having been one of the two robbers. At the lineup, appellant was represented by other than his trial counsel who was subsequently appointed on April 8, 1969.

The Government's first witness was Joshua Wilson, financial secretary of Cement Mason's Local 891 who was in

[redacted] on the date in question. He described in general, the office and the location in the office of a vault in which union funds were kept in a safe (Tr. 94-97). About noon on September 25th, while working at his desk, Wilson heard a tapping on the office window, by a man wearing a gold or orange turtle-neck sweater (Tr. 97-98). The man in the gold sweater then turned around and pulled the sweater over his nose (Tr. 98), while another man in the hall, dressed in grey, pointed a shotgun at him and said it was a holdup (Tr. 98). Mr. Wilson then made an in-court identification of the appellant as the man in the orange sweater (Tr. 98).

The witness [redacted] that he and Mr. Allen W. Quarterman, the union's business agent, also present in the office at the time, were forced by the two men to let them into the office and to remove the money from the safe. During these events, the witness was struck on the head by the man with the gun. The bleeding from this wound was profuse and forced him to remove his glasses (Tr. 99-102, 114-115). Mr. Wilson did not see the man in the gold sweater during the events in the office and could not recall if he removed the sweater from his face (Tr. 104, 110-113). Mr. Wilson testified that a little more than $1,000 was taken from the premises.

About twenty minutes later, two men were brought to the street in front of the union by the police in a wagon and were removed from the wagon for identification. Although he was not wearing his glasses, and the appellant, who was one of the two men was not wearing an orange sweater,

... (Tr. 103-104, 114-117, 116-120). Mr. Wilson ... testified ... earlier an identification of the appellant at 6:00 P.M. that evening in a police lineup in First Precinct Headquarters (Tr. 104-105, 117-118).

The next Government witness, Mr. Allen V. Quarterman, the union's business agent, testified that he observed two men in the hallway near the building entrance immediately prior to the events of the robbery. Mr. Quarterman generally corroborated Wilson's description of the actual robbery and of the persons who took the money (Tr. 152-155, 169, 170).

When the police showed him the two suspects in a police wagon that they had arrested shortly after the robbery, Mr. Quarterman did not identify the appellant (Tr. 159-161, 173-175). He then testified that he did identify the appellant at a police lineup that evening (Tr. 161) and made an in-court identification of the appellant as the man he had seen in the office with the orange-gold sweater (Tr. 161-162).

Mr. Quarterman also denied that he had discussed the identity of the suspects or the events of the robbery in the hall outside the police lineup room with the other identifying witnesses there present either before or after he viewed the lineup (Tr. 176-180).

The Government's next witness was a Miss Adams, the union local's secretary who had also been present in the office during the robbery. She testified that the man in the orange sweater was wearing sun glasses and had his orange sweater pulled over his nose (Tr. 184-185, 188-189, 192).

[illegible] identify appellant at the lineup (Tr. 191).

Mr. Taylor's uniform number was present at the site in the above question was the Government's next witness. He testified that he observed a man in an orange sweater from about 25 feet away minutes prior to the robbery (Tr. 196-198). A short while later he observed the same man leaving the building with another man in a grey sweater. Taylor gave chase to the two suspects and provided arresting police with descriptions and directions as to their probable whereabouts (Tr. 199-202, 205-209).

The police then arrested two men fitting the description given by Taylor in a northwest carry-out shop and Taylor identified these two as the men he had seen at the union office building (Tr. 209). He then made an in-court identification of the appellant (Tr. 209). On cross examination, Mr. Taylor testified that the man he saw in the union hall and on the street outside the hall was wearing an orange sweater, but that the man brought out of the carry-out was not wearing such a sweater (Tr. 256).

Mr. Taylor testified as to his identification of the appellant in the lineup that had been conducted the evening of the robbery (Tr. 209-214). Mr. Taylor stated that at the lineup that evening he had stood in the hall outside the lineup room with other witnesses who went in singly and did not discuss their identification or the earlier events, either before or after entering the room (Tr. 256-258).

The Government's next witness was Mr. Ralph McCalip, a union member who was [illegible] in question. He observed a man wearing an orange sweater enter the hall (Tr. 259-261, 265, and emerge shortly thereafter with another individual and leave. Mr. McCalip stated that neither person was wearing dark glasses (Tr. 261-263, 266).

Mr. McCalip testified that he identified both men when they were returned in the police wagon by the police 15-20 minutes later (Tr. 263, 266-268), after Mr. Taylor had, in the meantime, informed him that the two individuals had robbed the safe. He then made an in-court identification of the appellant as one of the two men he had observed and identified (Tr. 263).

McCalip further stated that he identified both suspects in a lineup conducted in police headquarters that evening (Tr. 264-265). He also denied discussing the proceedings with other witnesses present (Tr. 268-269).

Subsequent Government witnesses consisted primarily of police officers who described the arrest and who corroborated, in general, the earlier testimony of identifying witnesses, together with witnesses with respect to the counts for unauthorized use of a vehicle and petty larceny. Specifically, Detective Smythe told of arresting Mr. Brunson in the carry-out shop after being directed there by Mr. Taylor (Tr. 270-276). He further identified the car registration and keys found on Brunson and identified the license

... the [illegible] by the suspects (Tr. 276-279). Detective Smythe [illegible] identified appellant in the lineup but not appellant, apparently because of the latter's involvement with the wagon (Tr. 279-280). Detective Smythe was present at the lineup in question and heard the identifying witnesses standing together and conceded that they talked to each other" (Tr. 287) prior to the lineup and that he had conversed with the witnesses during the lineup procedure (Tr. 287).

Detective Hackett testified to arresting appellant in the carry-out while Smythe arrested Brunson (Tr. 292). He states that appellant was not wearing a gold sweater at the time of his arrest. Detective Hackett was present at the lineup that evening and instructed the witness on how to proceed (Tr. 290-293). Hackett corroborated that Messrs. McCalip, Quarterman and Wilson had identified appellant in the lineup whereas Miss Adams had not (Tr. 296-300).

Two final witnesses provided the details concerning the stolen car and license plates which were used in the robbery (Tr. 309-315).

Appellant took the witness stand in his own behalf. He corroborated the testimony given as to his incarceration in the police wagon and his subsequent identification by the above persons (Tr. 323-327). He stated, however, that during the time of the robbery he was visiting a friend named Snead and had entered the carry-out shop to get lunch (Tr. 324, 328, 329). At the lineup appellant stated that he and Brunson,

[illegible] previously (Tr. 33[illegible]), were made to stand together (Tr. 327). [illegible] that [illegible] appellant refused to sign any form of confession papers (Tr. 327, 328). On cross examination, appellant did not deviate from his prior description of the events in question (Tr. [illegible]).

In its instructions to the jury the court stated that a finding of guilty on the count of armed robbery would preclude a finding of guilty for robbery, count two (Inst., 17). The jury, however, found appellant guilty on both counts.

ARGUMENT

I. APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHT TO A FAIR TRIAL WHEN THE POLICE CONDUCTED A LINEUP OF THE APPELLANT AT WHICH THE ONLY COUNSEL PRESENT WAS A SUBSTITUTE COUNSEL WHOSE PRESENCE WAS NOT MADE KNOWN TO APPELLANT.

The appellant, James A. Watson, Jr., was arrested on September 25, 1968, and was placed in a lineup at 8:00 P.M. that evening. The lineup was conducted before counsel was appointed for the appellant's defense on April 8, 1969. During the pre-trial hearing on the appellant's motion to suppress identification testimony, it was stipulated by counsel that there was present at the lineup an attorney from the Legal Aid Agency whose presence, however, was unknown to Mr. Watson:

> "MR. SHUKER: Your Honor, before continuing in this matter, I believe it is known to both Mr. Klein and myself that there was in fact an attorney present at the lineup who was representing Mr. Watson, the attorney being Mr. Ted Christianson of the Legal Aid Agency.
>
> "I would ask that we have a stipulation as to this fact at this time.
>
> "MR. KLEIN: I would be willing to stipulate to the fact that Mr. Christianson was present at the lineup.
>
> "THE COURT: Very well.
>
> "MR. KLEIN: But that his presence was not made known to the defendant.
>
> "THE COURT: Very well." (Tr. 25)

This is the only indication in the entire record of the proceedings below with respect to assistance of counsel at the lineup. Counsel apparently was present but such counsel

did not represent appellant at the trial.

The Supreme Court, in United States v. Wade 388 U.S. 218 (1967) held that the lineup is a "critical stage of the proceedings against a criminal defendant at which he is entitled to the effective aid of counsel. 388 U.S. at 237.[1/] There the court stressed the possibilities for erroneous identification inherent in a lineup situation:

> "...the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. Those participating in a lineup with the accused may often be police officers (citations); in any event, the participants' names are rarely recorded or divulged at trial (citations). The impediments to an objective observation are increased when the victim is the witness." 388 U.S. at 230.

Effective representation at this critical stage of the proceedings was therefore deemed to be essential if a defendant's rights at trial were to be protected:

> "In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." 388 U.S. at 232.

Although in Wade [2/] the court recognized that the requirements of Wade could be met by the use of substitute counsel, the language of the opinion, at 388 U.S. 237, seems to regard the use of substitute counsel as justifiable only when notification to, and presence of, the accused's own counsel

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1/ The companion case of Stovall v. Denno 388 U.S. 293 (1967) applied the rule of Wade to lineups held after June 12, 1967. 388 U.S. at 296. Thus, the Wade requirements are clearly applicable to the facts of the instant case.

2/ 388 U.S. 218, 237 N. 27.

would result in prejudicial delay:

In Clemons v. United States 133 U.S. App. D.C. ___, 408 F.2d 1230 (1968), this court recognized a two-fold purpose in having counsel present and participating in the conduct of the lineup. The first is "to minimize the likelihood of an unduly suggestive confrontation," and the second is "to enable an informed challenge to be made at trial to either the admissibility or the credibility of identification evidence."[3/]

The second of these purposes cannot be served by use of substitute counsel at the lineup. The use of improper pre-trial confrontations between the accused and identifying witnesses to bolster or perhaps even suggest in-court identification is an abuse which trial counsel for the accused cannot alleviate unless he is a participant in the lineup proceedings. The Supreme Court impliedly recognized this by stating, without deciding, in Wade that substitute counsel may be used only when prejudicial delay may result. Nowhere in the record below is it proven or even suggested by the Government that a delay in the lineup proceedings until Mr. Watson could retain or be given court-appointed counsel would have prejudiced the rights of the accused.

The other rationale for the presence of counsel at a lineup is to minimize suggestive procedures. In United States v. Allen ___ U.S. App. D.C. ___, 408 F.2d 1287 (1969),

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3/ 133 U.S. App. D.C. at ___. [408 F.2d at 1234].

this court made certain suggestions as to procedures which could be followed at a lineup by the accused's counsel and the police. These included providing counsel with the names of attending witnesses, an indication of the nature of the crime and the description given by witnesses to the police. It was also suggested that counsel have a role in setting up the lineup and be permitted to make changes to avoid suggestive features.[4/] There is no indication whatsoever on the record of this case that any of these suggestions were followed. The fact that the presence at the lineup of substitute counsel was not made known to the appellant strongly suggests that he did not know he was represented by counsel at all and, moreover, that such counsel had no knowledge of the facts of the case sufficient to follow the procedures suggested in Allen, supra.

An additional problem with lineups mentioned by the Allen case is unfairly suggestive inter-witness communication at such proceedings. The court there suggested separating witnesses to prevent communication between them.[5/]

In this case, this possibility was extensively explored both at pre-trial and at trial.[6/] It appears that

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4/ ___ U.S. App. D.C. at ___. [408 F.2d at 1289].

5/ ___ U.S. App. D.C. at ___. [408 F.2d at 1289].

6/ Tr. pp. 18-22, 28-29, 43, 47-50, 69-70, 80-81, 85-86, 175-181, 192-195, 256-258, 268-269, 286-289, 297-298, 304-305.

the lineup witnesses were given instructions not to discuss their identifications either before or after viewing the lineup. These witnesses (Messrs. Wilson, Quarterman, Taylor and McCalip) who testified at the trial or at pre-trial concerning their lineup testimony stated they did not discuss the lineup. But other witnesses were in the hall and were not called to testify in court[7] and they could have discussed their identification. This potentially suggestive circumstance is just the type of problem that effective participation of counsel would avoid.

II. THE CIRCUMSTANCES SURROUNDING THE CONFRONTATIONS BETWEEN APPELLANT AND CERTAIN IDENTIFYING WITNESSES WERE SO UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO IRREPARABLE MISTAKEN IDENTITY AS TO AMOUNT TO A DENIAL OF DUE PROCESS OF LAW WHEN SUCH IDENTIFICATION TESTIMONY WAS INTRODUCED AT TRIAL.

Apart from constitutional abuses inherent in appellant's lack of effective counsel at the lineup his confrontation with certain identifying witnesses immediately subsequent to arrest occurred under circumstances amounting to a further deprivation of constitutional protection. In Stovall v. Denno, 388 U.S. 293 (1967) the Supreme Court recognized that the admission of evidence based upon an "unnecessarily suggestive [confrontation] and conducive to irreparable mistaken identification" constitutes a denial of due process of law.[8] There the court permitted the admission

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7/ Tr. p. 18. List three witnesses who participated in the lineup but were not called to appear in court, Mr. Baughm, Mr. Tibs, and Mr. Robinson.

8/ 388 U.S. at 302.

of the questionable evidence where the hospital bedside confrontation was "imperative" and was the "only feasible procedure."[9] There were several confrontations in the instant case which were conducted "under uncontrolled circumstances in which neither the witnesses nor the suspect were likely to detect suggestive influences", let alone be able to prove their existence in court."[10] Mr. Taylor first identified the appellant when in the custody of the two arresting police officers (Tr. 207-209). Messrs. Wilson and McCalip identified appellant upon appellant's descent from the police wagon, accompanied by police officers. Clearly guilt was implied in such a setting. Identifications were apparently made in each other's presence, and the one may have influenced the other (Tr. 267). Moreover, Wilson was injured and without his eyeglasses when he made the identification (Tr. 103-104). His state of mind could not have been conducive to a cool analysis of the identities of the suspects produced by the police. Clearly these circumstances suggested the guilt of appellant to the witnesses. Nor were such confrontations "imperative" as in Stovall. See also Stewart v. U.S., ___ U.S. App. D.C. ___, 418 F.2d 1110 (1969).

In weighing the total circumstances surrounding a confrontation to determine whether constitutional error

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9/ 388 U.S. at 302.

10/Gregory v. U.S., ___U.S. App. D.C. ___, 410 F.2d 1016, 1023 (1969).

is present the District of Columbia Circuit Court has considered the reliability of the identification evidence in [illegible] Russell v. U. S., ___ U.S. App. D.C. ___, 408 F.2d 1280 (1969); Gregory v. U. S., ___ U.S. App. D.C. ___, 410 F.2d 1016 (1969). Unlike the identifying witness in Gregory, the identifying witnesses referred to above, as union members, were victims of the robbery. Naturally they were agitated over their organization's loss of funds. Wilson, of course, had been injured by Brunson and made his on-the-scene identification without benefit of his usual eyeglasses.

This court in Clemons v. U. S., ___ U.S. App. D.C. ___, 408 F.2d at 1230 (1968) applied to due process identification cases within the Stovall ambit, certain exclusionary and evidentiary standards imposed by the Supreme Court in Wade, supra. Specifically, if the prosecution is unable to prove that the admission of tainted evidence was harmless beyond a reasonable doubt then it must by "clear and convincing evidence" show that there was an independent source for the identification evidence.[11/] Among the actual eyewitnesses to the robbery itself, however, there are conflicting statements and inconsistencies in identification. Miss Adams stated that the appellant wore dark glasses during the robbery (Tr. 184-185) whereas Messrs. Wilson and Quarterman made no such identification. Moreover Miss Adams, an actual eyewitness to the robbery, was unable to

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11/ 388 U.S. 218 at 240.

identity appellant at the lineup. Mr. Quarterman, likewise, was unable to identify appellant in a confrontation subsequent to the latter's arrest (Tr.159-166, 173-175.)

III. THE RECORD DOES NOT SHOW THAT THE GOVERNMENT HAS SHOWN BEYOND A REASONABLE DOUBT THAT THE ADMISSION OF THE ILLEGAL IDENTIFICATION EVIDENCE WAS HARMLESS ERROR.

In United States v. Wade, 388 U.S. 218 (1967), the Supreme Court provided that the infirmity of using illegal identification evidence may be avoided by either establishing the existence of an independent source for the identifications or by showing that the admission was harmless error.[12/] The tests for harmless error to be applied are those of Chapman v. California, 386 U.S. 18 (1967) expressly cited in Wade.[13/] The Government has a very rigorous task under the Chapman rule. As the beneficiary of the alleged constitutional error, the Government has the burden of proving beyond a reasonable doubt that the error was harmless to the appellant.[14/] The underlying rationale of this standard is, in the Supreme Court's words, to determine:

> ... whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.[15/]

The question then remains whether the Government can show harmless error on the facts of this case. In Chapman the

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12/ United States v. Wade, supra at 242.

13/ Id at 242.

14/ Chapman v. California, 386 U.S. at 24.

15/ Id at 23, quoting Fahy v. Connecticut, 375 U.S. 85 (1963).

court stated:

> An error in admitting plainly relevant evidence which possibly influenced the jury [illegible] to a litigant cannot ... be [illegible] harmless.[16]

Clearly the lineup identification testimony [illegible] under [illegible] the [illegible].

The only non-identification evidence on this record to connect the appellant with this crime is the fact that the arresting officer observed him in the carry-out shop with a bundle under his arm which later proved to contain a shotgun allegedly used in the robbery and an orange sweater allegedly worn by one of the robbers (Tr. 292-294). But this evidence is only circumstantial, and an equally reasonable inference is that the appellant found the bundle and picked it up. Moreover, appellant denied under oath having had possession of the bundle (Tr. 330). The other suspect arrested was in possession of the stolen property, as well as the car keys and registration (Tr. 273-278).

Mr. Taylor testified that the two robbers walked by him only half a block from the place of the arrests wearing the same clothing they wore in the robbery. Yet when arrested a few moments later, the appellant was wearing a green sweater, not an orange one (Tr. 206-209, 256, 301-302, 305). These inconsistencies in the testimony create a strong

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16/ Id at 23-24.

inference that the tainted identification evidence was decisive in the jury's deliberations and that its erroneous admission was harmful to the appellant.

IV. THE COURT BELOW ERRED IN PERMITTING THE JURY TO RETURN A VERDICT WHICH WAS INCONSISTENT, IN PART, WITH THE COURT'S INSTRUCTIONS TO THE JURY.

The offense of robbery in the District of Columbia is controlled by D.C. Code § 22-2901 (1967). But under the provisions of D.C. Code §§ 22-3201 and 22-3202, robbery can also be an aggravated offense when committed while armed with a dangerous weapon.

The court below instructed the jury on the elements of the offense of robbery as well as the element necessary to find the appellant guilty of armed robbery (Inst.11-16).

Then the court continued:

> ...then you may find him guilty of the offense of armed robbery as charged in the first count of the indictment.
>
> In that event, you disregard count two of the indictment, since the count two robbery charge is embraced within the armed robbery charge in count one of the indictment.
>
> If, however, you find that all of the essential elements of the offense of robbery as set forth in count two of the indictment have been proved beyond a reasonable doubt but the Government has failed to prove the use of a dangerous weapon in the commission of the robbery, then you may return a verdict of guilty under count two of the indictment (Inst.17).

But the jury ignored these instructions and found the appellant guilty of both robbery and armed robbery. The relevant proceedings were as follows:

> THE DEPUTY CLERK: Madam Floorlady,.(sic) has the jury agreed upon a verdict?

THE FOREWOMAN: Yes, we have.

THE DEPUTY CLERK: What say you as to the defendant James A. Watson on Count one of the indictment?

THE FOREWOMAN: Guilty.

THE DEPUTY CLERK: What say you as to Count Two of the indictment?

THE FOREWOMAN: Guilty. (Tr. 337)

No objection was made to this verdict and the court sentenced the appellant to 10-30 years on count one and 2-15 years on count two. The appellant was thus convicted and sentenced twice for the same offense. This is plain error which requires reversal and a new trial.

The court's instructions appear to correctly state the law. While there are no cases in the District of Columbia on this precise point, the logic of the proposition is most persuasive. A person cannot be convicted twice for what is the same offense in fact. For purposes of analogy, it is axiomatic that a criminal defendant cannot be convicted of both the offense charged in the indictment and a lesser and included offense. See Crosby v. United States 119 U.S. App. D.C. 244, 339 F.2d 743 (1964). Similarly, a criminal defendant may not be convicted of both the offense charged and the aggravated offense charged in the indictment when, the operative facts are precisely the same.

Generally, there is authority that each count of an indictment is treated as a separate offense. Runn v. United States, 284 U.S. 390 at 393 (1932). But in these

narrow circumstances, such a rule would permit the Government to twice indict, try, convict and commit a criminal defendant for the same offense, simply by charging him with an offense and its aggravated variation.

This double conviction is plain error affecting the substantial rights of the appellant and this court may review it, although the issue was not raised below.[17/] There is no indication on this record as to which of the two offenses the jury would have convicted the appellant if it had followed the court's instructions. If it had chosen the second count, the maximum sentence applicable to the appellant, under D.C. Code 22-2901, would be 15 years. The court has sentenced him to 10 to 30 years on the aggravated offense.

Clearly, substantial rights of the appellant are affected and require an order for a new trial by this court.

17/ See Jackson v. United States, 121 U.S. App. D.C. 160, 348 F.2d 772 (1965), and Byrd v. United States, 119 U.S. App. D.C. 360, 342 F.2d 939 (1965).

CONCLUSION

WHEREFORE, appellant respectfully prays that the judgment of conviction and the sentence below be reversed and vacated and that the case be remanded for a new trial.

Respectfully submitted

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James A. Watson, Jr.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief for Appellant has been personally served at the office of the United States Attorney, United States District Courthouse, Washington, D.C. this 15th day of April, 1970.

Thomas D. Brown, Jr.